

International Law Studies—Volume 30

International Law Situations

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## SITUATION I

### LONDON NAVAL TREATY, ARTICLE 22, AND SUBMARINES

It is granted that the London naval treaty<sup>1</sup> has been ratified by the signatories and that article 22 has been assented to by all other States. Subsequently there is war between states X and Y. Other states are neutral.

(a) The *Star*, a merchant vessel owned by a citizen of and flying the flag of state Y and having its decks stiffened for the mounting of 6-inch guns, receives a summons from submarine No. 5 of state X to lie to, but the *Star* continues on its course. Submarine No. 5 communicates with submarine No. 6, which is on the course the *Star* is taking, to sink the *Star*. Submarine No. 6 without coming to the surface sinks the *Star*.

After the war claims are made against state X on the ground that the action of the submarines was illegal. What should be the decision, and why?

(b) Would the discovery by submarine of state X that on an enemy merchant vessel equipped in a manner similar to the *Star* 6-inch guns are mounted and pointed toward the submarine be sufficient to justify sinking of the merchant vessel even if they are not yet fired?

(c) May the submarine order a merchant vessel to accompany it under penalty of being sunk?

## SOLUTION

(a) Under the conditions, the action of submarine No. 5 in summoning the *Star* to lie to is legal and submarine No. 5 may, in case of persistent refusal, use force as would

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<sup>1</sup> See the London Naval Treaty of 1930, Appendix, p. 137.



a surface vessel. The action of submarine *No. 6* in sinking the *Star* is illegal because not in accord with article 22 of the London naval treaty.

(b) The submarine of state X would be justified in firing upon an enemy merchant vessel whose decks have been strengthened for mounting 6-inch guns when the guns are mounted and pointed at the submarine.

(c) A submarine may order a merchant vessel to accompany it to port under penalty of being sunk.

#### NOTES

*London Naval Treaty, 1930.*—The London naval treaty of 1930 specifically states its purpose to carry forward the work begun at the Washington Naval Conference of 1921–22. At the Washington conference a treaty relating to the use of submarines and noxious gases in warfare was drawn up but was never ratified by all the powers. Article 22 of the London naval treaty of 1930 was therefore the carrying forward of the regulation of the use of submarines.

In the discussion of the submarine at the London Naval Conference the representative of Great Britain, followed by the representatives of the British Commonwealth of Nations, favored the abolition of the submarine.

The following statements were made by Mr. Stimson of the American delegation:

The American delegation at this conference is in favor of the abolition of the submarine. At the Washington conference in 1921–22 the American delegation accepted the view of their naval advisers that the United States needed a submarine force. They were therefore, at that time, opposed to its abolition. Such a stand was based upon purely naval strategy without reference to humanitarian considerations, because the conference agreed that the submarine should not be used against commerce except under the same obligations relative to the safety of passengers and crew, which applied to surface craft \* \* \*.

The essential objection to the submarine is that it is a weapon particularly susceptible to abuse; that it is susceptible of use

against merchant ships in a way which violates alike the old and well-established laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my own country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way which is most effective for immediate purposes, regardless of future consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished.

We have come to the conclusion that our problem is whether, in this day and age and after the experiences of the last war, the nations at this conference are justified in continuing to build these instruments of warfare, thereby assuming responsibility for the risk of repeating, in any possible future wars, the inhumane activities which have been condemned by the verdict of history. (Proceedings, London Naval Conference, 1930, p. 82 et seq.)

Mr. Leygues speaking for France said:

The submarine has often been mentioned as a machine without its like in naval warfare. That saying can hardly be maintained either as a matter of principle or as a matter of fact. Compared with the other ships, what are the distinctive features of the submarine? To the gun and torpedo, joined together, it adds submersion.

The latter discovery is never more surprising, nor in itself more unlawful, than was at the time of its first appearance the steamship as opposed to the sailing vessel.

To every improvement of offensive weapons corresponds a progress in defensive weapons. To the gun and the torpedo were opposed the armor, bulkheads, and the bulge. Against the surprise attacks of the submarine, navies already protect themselves by nets, mines, and the listening detectors.

The wireless has indeed multiplied the military efficiency of the submarine. But it must be some day or other outdone by a new appliance which will not only reduce its offensive or defensive powers to the level of older weapons but will show off its relative weakness.

Only the total abolition of war fleets might put a stop to the continual progress of technical evolution.

It has been maintained, on the other hand, that the submarine could only be used against merchant ships. The history of the recent war proves the contrary. \* \* \*



We have yet to discuss the opinion that has been spread of the submarine being a barbarous instrument of war. It owes such a reputation to the use made of it in some quarters against merchant ships, in violation of the principles of humanity which are the foundation of international laws. But such violation is ascribable to those who have used the submarine to that effect, not to the submarine itself.

The use of the submarine against merchant ships is not necessarily unlawful. Everything depends on the intention behind it. There is no weapon which can not be used for criminal purposes. \* \* \*

Since then, the evolution of the submarine has made it still more capable of carrying out extended operations while observing the rules established for surface ships. If submarines can fulfill the same duties, why should they not enjoy the same rights?

The logical conclusion is to treat alike, as far as both rights and duties are concerned, the submarine and the surface ship, and this is the conclusion to which the French Government has come.

The French Government is of opinion that an unrestricted submarine war against maritime trade should be outlawed. The right of visit, search, and seizure should be exercised by submarines under the rules, both present and future, to be observed by surface ships. (Ibid., pp. 85, 87.)

Admiral Takarabe, of the Japanese delegation, said:

The merits of a submarine are to be judged not by what it did but by what it is. It is not a ruthless weapon to be condemned in contradistinction to the surface craft. For that matter, what weapons of war can not be put to the merciless use of victimizing lives and property to no purpose? \* \* \*

As to the necessity of putting an end, once and for all, to the recurrence of the appalling experiences of the World War, Japan heartily associates herself with the proposal which is apparently in the minds of all our colleagues to submit this category of arms to a strict circumscription by law. It was Japan's wish that the measure should early be adopted, and she not only signed the submarine treaty agreed upon at the Washington Conference but soon ratified it. She wishes most ardently that the present conference will revive that question and will succeed in finding a proper and effective formula, but more satisfactory in its conception than its invalid predecessor, so that all powers represented at this table should unite in making it operative in no distant future. Japan gives her full support to an undertaking to outlaw the illegitimate use of the legitimate and defensive agency of war. (Ibid., pp. 91, 92.)

A committee of jurists considered the proposition referred to committee No. 1 by the conference at its fourth plenary meeting in regard to "forbidding submarines to act towards merchant ships, otherwise than in strict conformity with the rules, either present or future, to be observed by surface warships."

This committee of jurists recommended a declaration to the following effect:

The undersigned, duly authorized to that effect on behalf of their respective Governments, hereby make the following declaration:

The following are accepted as established rules of international law:

(i) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface war vessels are subject.

(ii) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed the passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land or the presence of another vessel which is in a position to take them on board. (Ibid. p. 189.)

In its report the committee said:

The committee wish to place it on record that the expression "merchant vessel," where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel. (Ibid. p. 189.)

While this report was not adopted by the conference, it is usually regarded in absence of statement to the contrary that an article is to be interpreted in the sense in which it is interpreted by the drafting committee.

*Loss of immunities.*—The attempts to define such terms as "armed ship" have met with many difficulties. Attempts to define the term for purposes of national admin-



istration have not been satisfactory. National courts have been obligated to make interpretations of their own laws in case of capture of armed ships. Prize money, bounty to the personnel of a vessel of war making a capture, and similar awards were common till recent times and are still made.

In 1805 in the case of *Several Dutch Schurjts* the British court in declining to grant head money to the captors of "armed vessels taken from the enemy, and described as transports" said:

They may be armed only for their own defense; as they have no commission to act offensively, they can not be considered legally as ships of war, to the effect of entitling the captors to head money. (6 Robinson Admiralty Reports, p. 48.)

A somewhat different attitude was taken by the judicial committee of the Privy Council in the case of H. M. submarine *E-14*, which destroyed the Turkish vessel *Guj Djemal* on May 10, 1915. The prize court had dismissed the claim of the personnel of the *E-14* for prize bounty on the ground that under the naval prize act of 1864 the expression "armed ships" should be construed to mean "a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement," and that the *Guj Djemal*, acting as a Turkish transport, was not such a ship. The case was dismissed without prejudice in case further evidence could be adduced.

The facts proved at the first hearing were as follows: (a) The *Guj Djemal* before the war was a unit of the Turkish Navy, and appeared as such in the official lists of the Turkish Naval Forces; (b) the *Guj Djemal* was a fleet auxiliary manned by naval ratings and commanded by an officer of the Turkish Navy; (c) Turkish fleet auxiliaries were usually armed with about four light 6-pounder guns, but there was no definite evidence that the *Guj Djemal* was so armed; (d) the *Guj Djemal*, at the time of her destruction, was carrying troops, with their rifles and ammunition, to the number of approximately 6,000; (e) the *Guj Djemal* had on board six field guns, but there was no definite evidence as to where the guns were placed; (f) the *Guj Djemal* was escorted

by a torpedo boat destroyer, and either the *Guj Djemal* or her escort fired at *E-14*; and (g) rifle fire is effective against the periscope of a submarine and *E-14* had previously lost one periscope, and had the other become damaged she would have been unable to return through the Dardanelles to her base.

The further facts proved at the second hearing, in addition to the head bounty certificates produced, were that: (a) the *Guj Djemal* was in fact armed with six light quick-firing guns; (b) the field guns were placed on board the *Guj Djemal* in the after part of the ship, and on each side of the ship in such manner that they could be used as an addition to the armament of the ship, and ammunition for the guns was placed alongside the guns; and (c) field guns had in fact been used in similar circumstances to fire on His Majesty's submarines operating in the Sea of Marmora. (3 Grant, Br. and Col. Prize Cases, p. 568.)

In rendering the judgment of the judicial committee, Lord Sumner said as to the question whether the *Guj Djemal* is "an armed ship of any of His Majesty's enemies":

This is entirely a matter of construction of the section in its application of the facts of this case, and no other question was raised in the appeal. Little assistance, if any, is to be derived from prior decisions or earlier legislation. No decision before the war turned on or touched this section, and in the cases decided during the war the present contention had not been raised. The older acts go back for many generations. At one time the number of guns, and not of men carried by the ship destroyed, was the measure of the grant, and until the Crimean War the expression "armed ship" was not used. (1920 A. C., p. 403.)

It was admitted that the combatant capacity of the *Guj Djemal* was not high and that she had not used her armament, that the armament was only incidental, and that such contentions had influenced the prize court in deciding that an armed ship, within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement. This construction was not sustained on appeal, and it was said:

Evidently this proposition is open to several objections. It makes the rights of His Majesty's forces depend on the purpose with which his enemies may have dispatched their vessel on what



either way is a warlike service. It employs a term, "offensive action," which, in practice, is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage: "In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defense; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their lordships are unable to accept these propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in state service would be covered by those words. There is again no evidence that the rifles and field pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defense is not confined to taking to one's heels or even to returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of a ship's commission is to introduce something which involves a rewriting of the section.

Their lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed; that the decree appealed against should be set aside; and that this appeal should be allowed with costs, and that the case should be remitted to the prize court to make such formal decree in favour of the appellants as may be required. Their lordships will humbly advise His Majesty accordingly. (3 Grant, Br. & Col. Prize Cases, p. 568.)

This judgment shows the difficulty of establishing criteria for such words as "offense" and "defense." It may also be said that "the test of the ship's commission" is in general difficult, if possible, for an enemy to apply.

The status of armed merchant vessels has raised questions in regard to both policy and law. If the law is not clear, then the relations as belligerent on the offensive, on the defensive, and as a neutral must be considered and the policy determined accordingly.



During the World War there was much difference of opinion as to the law, particularly because of new exigencies of transportation. Early precedents concerned with the irregular maritime warfare of the period prior to and during the Napoleonic wars refer to private and public vessels only.

Publicly owned armed or unarmed merchant vessels make a practically new category upon which there is much difference of opinion. Such publicly owned vessels of a belligerent certainly have a doubtful status both as regards the belligerents and as regards the neutrals. Naturally there arise questions as to the reasons for and the liability in consequence of arming. Some maintain that the rights and duties of the vessels themselves would under modern conditions change. The source of the equipment and the personnel for its use has in recent years been entirely different from that of private vessels of the early years of the nineteenth century.

The volunteer fleet of Imperial Russia and similar fleets of other States raised questions in regard to piracy or the piratical nature of armed merchant vessels.

Subsidized merchant vessels and the state control of shipping introduced a mixed relationship to the state of the flag.

The position of the United States was not uniform throughout the war, and when the Dutch ships were taken over other complications were introduced; while the requisitioning of other vessels gave rise to further questions.

The problems of conversion and the place of conversion may properly be considered.

Armed merchant vessels in neutral waters may provoke such correspondence as that between the Netherlands and Great Britain.

The attitude of the Conference on Limitations of Armament in 1921-22 and in 1930 presumed the arming of merchant vessels.

Many neutrality proclamations during the World War anticipated that merchant vessels might be armed.

Neutral merchant vessels received guns and took on naval gun crews, and the effect upon their status was debated.

The correspondence of the United States on armed merchant vessels began early in the World War and continued till the United States entered the war.

The effect of arming merchant vessels may modify the operation of the well-established rules of the Declaration of Paris in regard to goods on enemy vessels. It should be emphasized that acts of retaliation do not change the law.

*Classes of armed vessels.*—The classification of armed vessels in order that their treatment in time of war might be determined has long been a subject of discussion. At the Hague Conference of 1907 Lord Reay proposed a classification of vessels of war into (1) *vaisseaux de combat*, and (2) *vaisseaux auxiliaires*. After much discussion and a report by a committee the definition of *vaisseaux auxiliaires* was withdrawn. In 1912 British regulations stated:

The term "ship of war" is to be understood as including all ships designated as such in the accepted sense of the term and also auxiliary vessels of all descriptions.

In a note of August 4, 1914, from the British chargé to the Secretary of State of the United States, the attention of the United States was called to the rules of the treaty of Washington of 1871 as having "the force of generally recognized rules of international law." It was also stated that Germany might attempt to equip and despatch merchantmen from ports of the United States for conversion on the high seas and that preparations for such purpose might be manifest before the vessel left port and that in these cases "His Majesty's Government will accordingly hold the United States Government responsible for any damages to British trade or shipping,



or injury to British interests generally, which may be caused by such vessels having been equipped at or departing from United States ports." (9 Am. Jour. Int. Law, Spec. Sup., July, 1915, p. 222.)

In another note of August 9, 1914, referring to the previous note, not merely the British point of view as to the responsibility but also as to the duty of neutrals was set forth as regards British armed merchant vessels:

As you are no doubt aware, a certain number of British merchant vessels are armed, but this is a precautionary measure adopted solely for the purpose of defense, which, under existing rules of international law, is the right of all merchant vessels when attacked.

According to the British rule, British merchant vessels can not be converted into men-of-war in any foreign port, for the reason that Great Britain does not admit the right of any power to do this on the high seas. The duty of a neutral to intern or order the immediate departure of belligerent vessels is limited to actual and potential men-of-war, and in the opinion of His Majesty's Government there can therefore be no right on the part of neutral governments to intern British armed merchant vessels which can not be converted into men-of-war on the high seas nor to require them to land their guns before proceeding to sea.

On the other hand, the German Government have consistently claimed the right of conversion on the high seas, and His Majesty's Government therefore maintain their claim that vessels which are adapted for conversion and under German rules may be converted into men-of-war on the high seas should be interned in the absence of binding assurances, the responsibility for which must be assumed by the neutral government concerned, that they shall not be so converted. (Ibid. p. 223.)

The United States in a note of August 19, 1914, disclaimed as a correct statement of its responsibility the assertion of the British note. The British ambassador on August 25, 1914, gave the Secretary of State "the fullest assurances that British merchant vessels will never be used for purposes of attack; that they are merely peaceful traders armed only for defense; that they will never fire unless first fired upon; and that they will never under any circumstances attack any vessel." (Ibid. p. 230.) Later, on September 9, 1914, the atti-

tude which the British affirmed as correct under international law was stated.

A merchant vessel armed purely for self-defense is, therefore, entitled under international law to enjoy the status of a peaceful trading ship in neutral ports and His Majesty's Government do not ask for better treatment for British merchant ships in this respect than might be accorded to those of other powers. They consider that only those merchant ships which are intended for use as cruisers should be treated as ships of war and that the question whether a particular ship carrying an armament is intended for offensive or defensive action must be decided by the simple criterion whether she is engaged in ordinary commerce and embarking cargo and passengers in the ordinary way. If so, there is no rule in international law that would justify such vessel, even if armed, being treated otherwise than as a peaceful trader.

In urging this view upon the consideration of the United States Government the British ambassador is instructed to state that it is believed that German merchant vessels with offensive armament have escaped from American ports, especially from ports in South America, to prey upon British commerce in spite of all the precautions taken. German cruisers in the Atlantic continue by one means or another to obtain ample supplies of coal shipped to them from neutral ports; and if the United States Government take the view that British merchant vessels which are bona fide engaged in commerce and carry guns at the stern only are not permitted purely defensive armament, unavoidable injury may ensue to British interests and indirectly also to United States trade which will be deplorable. (*Ibid.* p. 233.)

This note seems to mix to some degree, legal and commercial reasoning.

On March 2, 1916, the British Government made public instructions issued in regard to armed merchant ships which were stated to be an affirmation of a policy which had remained unchanged throughout the war. In these instructions the circumstances under which armament should be employed were as follows:

(1) The armament is supplied for the purpose of defense only. The object of the master should be to avoid action whenever possible.

(2) Experience has shown that hostile submarines and aircraft have frequently attacked merchant vessels without warning. It is important, therefore, that craft of this description



should not be allowed to approach to short range, at which a torpedo or bomb launched without notice would almost certainly be effective. British and allied submarines and aircraft have orders not to approach merchant vessels; consequently, it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defense in order to prevent the hostile craft from closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible.

(3) An armed merchant vessel proceeding to render assistance to the crew of a vessel in distress must not seek action with any hostile craft, though if she herself is attacked while doing so fire may be opened in self-defense.

(4) It should be remembered that the flag is no guide to nationality. German submarines and armed merchant vessels have frequently employed the British, allied, or neutral colors to approach undetected. Though, however, the use of disguise and false colors to escape capture is a legitimate ruse de guerre, its adoption by defensively armed merchant ships may easily lead to misconception. Such vessels, therefore, are forbidden to adopt any form of disguise which might cause them to be mistaken for neutral ships. (1917 N. W. C., International Law Documents, p. 154.)

In paragraph (2) there is provision for opening fire by the armed merchant vessel, and paragraph (4) shows some of the possible consequences anticipated from arming of merchant vessels. These depart from the assurances of August 25 that British armed merchant vessels "will never fire unless first fired upon, and that they will never under any circumstances attack any vessel."

In 1916 in a document ordered printed by the Senate of the United States a translation of a report citing the opinion of Prof. W. J. M. von Eysinga, then of the University of Leiden, later a judge of the Permanent Court of International Justice, it was said:

It is difficult to predict what is to be the development of the obscure legal category *ships*. In any case this development will be strongly influenced by the attitude of insurance companies toward armed merchantmen. Just now no other governments seem as yet to have followed the example of the British Admiralty. Still the number of armed ships sailing under the British flag keeps on increasing and the other governments will be con-

strained by the fact to inquire what shall be their attitude toward these ships both in time of peace and in time of war. If an English war were to arise, would not neutral powers transgress by admitting armed merchantmen to their ports and waters? What measures will neutral powers be obliged to take in order to prevent these armed ships from assuming the right to enforce restrictive measures on neutral commerce? Does public security allow of admitting armed ships to enter port, even in time of peace, without having unloaded their explosives? And are belligerents to take these armed ships as belligerent ships, or are they to have to treat them otherwise? If so, in what manner?

All these questions and many others would lose their practical significance if a way were found to abolish the institution of armed merchantmen. It will not be an easy matter. But possibly Great Britain might be induced to abandon the course upon which she has entered. It need not be said that the problem would no longer have a practical side if a way were found to "regularize" the armed ships by granting them the juridical status of what in reality they seem to be, viz, auxiliary men-of-war. The study of this solution should also include the question whether a government arming ships without assuming responsibility for their acts is satisfactorily performing the duties which members of the community of nations owe to their fellows. (S. Doc. No. 332, 64th Cong., 1st sess., p. 43.)

*Attitude of Netherlands.*—The Netherland declaration of neutrality, August 5, 1914, denied access to continental Dutch ports to "warships or ships assimilated thereto."

British opposition to this Dutch position was immediate in a telegram of Sir Edward Grey, August 8, 1914. (British Parliamentary Papers, Misc., No. 14 (1917) Cd. 8690.) In a letter of April 7, 1915, the Dutch Minister of Foreign Affairs said of his Government: "The observation of a strict neutrality obliges them to place in the category of vessels assimilated to belligerent warships those merchant vessels of the belligerent parties that are provided with an armament and that consequently would be capable of committing acts of war" (Ibid, p. 3), and on July 31, 1915, he again maintains the Government's purpose to exclude "any belligerent merchant vessel armed with the object of committing, in case of need, an act of war." (Ibid, p. 6.) The Government at the same



time admits that such armament may be lawful, so far as the belligerent is concerned.

In a letter of April 4, 1917, Mr. Loudon says:

In fact, a state in the very special geographical position in which the Netherlands find themselves in relation to the belligerent nations could not insure respect for neutrality of the territory under its jurisdiction, except by forbidding access to this territory not only to warships but also to every armed vessel. (Ibid., p. 8.)

Lord Robert Cecil in May, 1917, made an extended argument to maintain that an "armed merchantship, such as those with which we are now dealing," can in no sense be assimilated to a warship, which phrase should cover only auxiliary vessels of various kinds and not armed merchant vessels. (Ibid., p. 11.) He also intimated that Great Britain "must hold the Netherlands Government responsible for all losses to British ships trading with Holland so long as those vessels are, if they enter a Netherlands port, obliged to forego their right to provide themselves with means of self-defense." (Ibid., p. 13.) This responsibility the Dutch Government declined "without hesitation."

*South American attitude toward armed merchant vessels.*—After the publication of the memorandum of the Department of State of September 19, 1914,<sup>1</sup> some of the South and Central American states inclined to follow the same procedure in regard to the treatment of armed merchant vessels. Some of these states, however, found cause for complaint in the arming of merchant vessels, and domestic laws in some states prohibited the entrance of vessels with explosives on board, and some states had other regulations restricting the entrance and sojourn of such vessels. Complaint was made in South America in the early days of the World War that if armament was solely for defense it would generally be useless, that the responsibility for the use of armament should be upon the state whose flag the vessel flew; that irresponsible mer-

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<sup>1</sup> Naval War College, International Law Topics, 1916, p. 93,



chantmen would not be familiar with or observe the laws of maritime warfare; that such vessels would be neither privateers nor merchantmen but privileged vessels free from the restrictions placed upon vessels by the existing laws of neutrality. Further, if the arms were used solely for defense, the use of these arms or the fact that they were on board for possible use would justify an enemy in attacking such vessels without meeting the usual obligations prior to attack, thus unnecessarily endangering innocent persons and property. Some of these states in early discussions and reports predicted that the arming of merchant vessels would be followed by abuses which would give rise to complications which might and should be avoided by enrolling all armed vessels in the regular or auxiliary forces.

*British opinion, 1916.*—On December 21, 1916, the First Lord of the Admiralty, replying to a question on armed merchant vessels, said:

His Majesty's Government can not admit any distinction between the rights of unarmed merchant ships and those armed for defensive purposes. It is no doubt the aim of the German Government to confuse defensive and offensive action with the object of inducing neutrals to treat defensively armed vessels as if they were men-of-war. Our position is perfectly clear—that a merchant seaman enjoys the immemorial right of defending his vessel against attack or visit or search by the enemy by any means in his power, but that he must not seek out an enemy in order to attack him—that being a function reserved to commissioned men-of-war. So far as I am aware, all neutral powers, without exception, take the same view, which is clearly indicated in the Prize Regulations of the Germans themselves. I have confined myself to stating the general position, but my honorable friend may rest assured that the departments concerned are devoting continuous attention to all questions connected with the theory and practice of defensive armament. (88 Parliamentary Debates, Commons, 1916, 5th series, p. 1627.)

*Case of the "Panama."*—In the case of the *Panama*, a Spanish vessel carrying mail, 1898, the Supreme Court said:

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defense. But that armament was not of itself inconsiderable, as appears not only from the undisputed facts of the case but from the action of the district court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that in case of war that Government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war. (176 U. S. [1900] 530.)

*Article 14 and days of grace.*—Article 14 of the Washington Treaty Limiting Naval Armament, 1922, provides that—

No preparations shall be made in merchant ships in time of peace for the installation of warlike armaments for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6-inch (152 millimeters) caliber. (1921 N. W. C., International Law Documents, p. 299.)

Many queries have arisen as to the treatment of merchant ships having decks stiffened for 6-inch guns.

It seems to be clear that under article 5 of Sixth Hague Convention, 1907, relative to the status of enemy merchant ships at the outbreak of hostilities, the question might arise. Article 5 is as follows:

The present convention does not affect merchant ships whose construction indicates that they are intended to be converted into ships of war.

The French text, which is official, is:

La presente Convention ne vise pas les navires de commerce dont la construction indique qu'ils sont destinés à être transformés en bâtiments de guerre.

The representatives of the United States at The Hague did not sign this on the ground that it should have been



more positive in its obligations in order to conform with existing law, and Great Britain denounced the convention in 1925 for similar reasons.

This article 5 was proposed by the British delegation in 1907, and the words used were, "*navires marchands ennemis susceptibles d'être transformés en vaisseaux de combat.*" The drafting committee made this read, "*navires marchands qui ont été désignés d'avance pour être transformés en bâtiments de guerre.*"

This article 5 was discussed at length in the conference. In the discussion Lord Reay, of the British delegation, said he had—

no idea of casting suspicion upon the good faith of Governments, but that the British delegation consider vessels capable of conversion as "potential" fighting ships, and, therefore, as forming part of the naval forces of a belligerent. Hence he considers it necessary to stipulate clearly that such vessels do not enjoy the privileged status granted to the other vessels referred to in the project. Article 5 is the essential condition upon which depends the adoption of the project as a whole by his delegation. (3 Proceedings Hague Peace Conferences, Conference of 1907, Carnegie Endowment for International Peace, p. 1020.)

Lord Reay had earlier said "vessels built with a view to war can not escape the treatment to which warships are subjected." (Ibid., p. 941.) In this plenary conference it was explained that it was not the purpose to give exemptions to merchant ships intended for conversion into vessels of war but that these "should be expressly left out of the proposed provisions and kept under the jurisdiction of the present law. That is the object of article 5, according to which the build of the ships in question should serve to indicate their ultimate purpose." (Ibid., vol. 1, p. 250.)

As article 14 distinctly states the purpose of stiffening the decks as "for the purpose of converting such ships into vessels of war," manifestly such vessels would not have the advantages of the days of grace as in the class of regular merchant vessels, and it can scarcely be imag-

ined that a belligerent would accord to such vessels the same privileges in other respects.

*Naval unit.*—Questions have long been raised as to what constitutes a naval unit. With the Declaration of Paris of 1856 by which a blockade “in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy”—there came questions as to what force was essential to make it sufficient under the terms. The Supreme Court of the United States in 1899 in the case of *The Olinde Rodrigues* (174 U. S. 510) said that “what might be sufficient force was necessarily left to be determined according to the particular circumstances.” General Order 492 of the Secretary of the Navy, June 20, 1898, had stated that there must be maintained “a force sufficient to render ingress to or egress from the port dangerous.” Early decisions had used similar expressions as “exposure to certain danger,” “dangerous to attempt to enter it,” “attended with evident danger,” “incurring risk.” The court would not allow the captured vessel to plead that blockade was not legally effective.

The question as to what might constitute a blockading force has been raised from time to time and was particularly considered at the London Naval Conference, 1908–9. The official report on the Declaration of London, which declaration has not been ratified, said:

When a government decides to undertake blockading operations against some part of the enemy coast it assigns a certain number of warships to take part in the blockade and intrusts the command of these to an officer whose duty is to insure by this means the effectiveness of the blockade. The commander of the naval force thus formed distributes the ships placed at his disposal according to the configuration of the coast and the geographical position of the blockaded places and gives each ship instructions as to the part which she has to play, and especially as to the zone intrusted to her surveillance. It is all of the zones of surveillance together, organized in such manner that the blockade is effective, that form the radius of action of the blockading naval force.



The radius of action so understood is closely connected with the effectiveness of the blockade, and also with the number of ships employed on it.

Cases may occur in which a single ship will be enough to maintain a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary—on condition as circumstances allow the blockading ship to stay near enough to the entrance. In that case the radius of action is itself near the coast. But, on the contrary, if circumstances force her to remain far off, it may be that one ship would not be enough to secure effectiveness, and to maintain this it will then be necessary to add other ships. (1909 N. W. C., *International Law Topics*, p. 49; Br. Parliamentary Papers, Misc. No. 5 [1909], Cd. 4555, p. 255.)

This report and other opinions seem to indicate that the forces engaged in a single operation or under the command of one officer detailed for the operation would be regarded as a unit. The “forces raised or to be raised” might be under a general command but would not be a unit in the sense here used unless engaged in one operation against a single objective. Certainly the ships under a single command and engaged in a single operation would be regarded as a unit.

Questions relating to the distribution of prize money have often given rise to differences of opinion as to what vessels may share as taking part in a capture. “Vessels in sight” were often regarded as participating. During the World War such questions naturally came before the Allies. A convention between France and Great Britain, agreed upon in 1914 and later acceded to by Italy, provided:

ART. 4. When a capture shall be made by a cruiser of one of the allied nations in the presence and in the sight of a cruiser of the other, such cruiser having thus contributed to the intimidation of the enemy and encouragement of the captor, the adjudication thereof shall belong to the jurisdiction of the actual captor.

ART. 5. In case of condemnation under the circumstances described in the preceding articles:

1. If the capture shall have been made by vessels of the allied nations whilst acting in conjunction, the net proceeds of the prize, after deducting the necessary expenses, shall be divided

into as many shares as there were men on board the capturing vessels, without reference to rank, and the shares of each ally as so ascertained shall be paid and delivered to such person as may be duly authorized on behalf of the allied government to receive the same, and the allocation of the amount belonging to each vessel shall be made by each government according to the laws and regulations of the country.

2. If the capture shall have been made by cruisers of one of the allied nations in the presence and in sight of a cruiser of the other, the division, the payment, and the allocation of the net proceeds of the prize, after deducting the necessary expenses, shall likewise be made in the manner above mentioned. (1917 N. W. C., International Law Documents, p. 146.)

The capture of a vessel under such conditions, while regarded as a joint capture, is not the act of a force under a single command but of a force constructively engaged in a single operation resulting in the capture of the prize.

*American proposal, 1916.*—The Secretary of State made to the ambassadors of the Governments of Great Britain and allied powers in 1916 a proposal in regard to a modus vivendi as to submarines and armed merchant vessels. In this communication he said:

Your excellency will understand that in seeking a formula or rule of this nature I approach it of necessity from the point of view of a neutral, but I believe that it will be equally efficacious in preserving the lives of all noncombatants on merchant vessels of belligerent nationality.

My comments on this subject are predicated on the following propositions:

1. A noncombatant has a right to traverse the high seas in a merchant vessel entitled to fly a belligerent flag and to rely upon the observance of the rules of international law and principles of humanity if the vessel is approached by a naval vessel of another belligerent.

2. A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

3. An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.

4. Such vessel should not be attacked after being ordered to stop unless it attempts to flee or to resist, and in case it ceases to flee or resist the attack should discontinue.

5. In the event that it is impossible to place a prize crew on board of an enemy merchant vessel or convoy it into port, the



vessel may be sunk, provided the crew and passengers have been removed to a place of safety. (1916 U. S. For. Rel., Sup., p. 146.)

The American proposal, in the opinion of the French ambassador, seemed to raise questions that were not easy. The ambassador said:

The chief difficulty will be what guaranty shall we have that the contemplated agreements, which are simply a reenactment of old established rules, will henceforth be observed? Shall we have yours? If so, well and good, but I doubt you will undertake such a risky thing. \* \* \* The question of the place of safety is also a difficult one. Up to now the Germans have understood by this the packing of people in small boats abandoned in the open sea where they have died by the hundred, more than probably a cruel, lingering death, many of them. The German note concerning the *Frye* announces the abandonment of this particular part of the frightful system of that nation. But it is not clear what or whom this applies to. It seems as if only ships under the American flag were to benefit by it. If you could let me know how you interpret the promise, I should be very thankful and it might be of real use. (Ibid. p. 149.)

The proposal of the United States did not seem reasonable to the British Government, and the American ambassador in London reported that the pressing of the American proposal would be regarded by the Allies as yielding to German influences and as more or less unfriendly interference.

*German attitude, 1916.*—On February 4, 1916, just a year after the announcement of submarine warfare by Germany, the German ambassador in Washington, in a communication to the Secretary of State, said that the German submarine war against England's commerce at sea "is conducted in retaliation of England's inhuman war against Germany's commercial and industrial life. It is generally recognized as justifiable that retaliation may be employed against acts committed in contravention of the law of nations. Germany is enacting such retaliation because it is England's endeavor to cut off all imports from Germany by preventing even legal commerce of the neutrals with her and thereby subjecting



the German population to starvation. In answer to these acts Germany is making efforts to destroy England's commerce at sea, at least as far as it is carried on by enemy vessels. If Germany has notwithstanding limited her submarine warfare, this was done in view of her long-standing friendship with the United States and in view of the fact that the sinking of the *Lusitania* caused the death of citizens of the United States. Thereby the German retaliation affected neutrals which was not the intention, as retaliation must not aim at other than enemy subjects." (1916, U. S. For. Rel. Sup., p. 157.)

*Armed merchant vessels and submarines.*—During the World War, 1914-1918, there was much discussion of the relations of armed merchant vessels and submarines. It was readily admitted that a shell from a gun of even small caliber might destroy a submarine. Some states have permitted arming of merchant vessels with guns not exceeding 6 inches. The right of an enemy merchant vessel to resist by force visit and search has long been recognized and was formerly grounded upon the need of protection against pirates and privateers. In the days just before the World War British officials had argued that "the proper reply to an armed merchantman is another merchantman armed in her own defense," and that "surely these ships will be quite valueless for the purpose of attacking armed vessels of any kind." In 1914 Mr. Churchill, First Lord of the British Admiralty, said: "These are armed solely for defensive purposes. Their guns are mounted in the stern and can fire only on the pursuer." (59 Parliamentary Debates, Commons, 1914, p. 1925.) In 1916 the German Foreign Office communicated to the American ambassador in Germany what purported to be copies of instructions to British merchant vessels, found on board the English steamer *Woodfield*.

In no circumstances is this paper to be allowed to fall into the hands of the enemy.

This paper is for the master's personal information. It is not to be copied, and when not actually in use is to be kept in safety in a place where it can be destroyed at a moment's notice.

Such portions as call for immediate action may be communicated verbally to the officers concerned.

APRIL, 1915.

#### INSTRUCTIONS REGARDING SUBMARINES APPLICABLE TO VESSELS CARRYING A DEFENSIVE ARMAMENT

1. Defensively armed vessels should follow generally the instructions for ordinary merchant ships.

2. In submarine waters guns should be kept in instant readiness.

3. If a submarine is obviously pursuing a ship by day, and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defense, notwithstanding the submarine may not have committed a definite hostile act, such as firing a gun or torpedo.

4. In view of the great difficulty in distinguishing a friend from an enemy at night, fire should not be opened after dark unless it is absolutely certain that the vessel fired at is hostile.

5. Before opening fire the British colors must be hoisted.

It is essential that fire should not be opened under neutral colors.

6. If a defensively armed vessel is pursued by a submarine the master has two alternatives:

(a) To open fire at long range immediately it is certain that the submarine is really in pursuit.

(b) To retain fire until the submarine has closed to a range, say, 800 yards, at which fire is likely to be effective.

In view of the very great difficulty of distinguishing between friendly and hostile submarines at long range (one British submarine has already been fired at by a merchant vessel which erroneously supposed herself to be pursued by the submarine), it is strongly recommended that course (b) should be adopted by all defensively armed ships.

7. A submarine's flag is no guide to her nationality, as German submarines frequently fly British colors.

8. Vessels carrying a defensive armament and proceeding to neutral ports must not be painted in neutral colors or wear a neutral flag.

9. It is recommended that in neutral ports, particularly those of Spain, the armament should be concealed as far as possible.

A canvas cover is recommended for this purpose. (1916 U. S. For. Rel., Sup., p. 196.)

The German ambassador handed to the Secretary of State of the United States on January 7, 1916, the following statement:

(1) German submarines in the Mediterranean had from the beginning orders to conduct cruiser warfare against enemy merchant vessels only in accordance with general principles of international law, and in particular, measures of reprisal, as applied in the war zone around the British Isles were to be excluded.

(2) German submarines are therefore permitted to destroy enemy merchant vessels in the Mediterranean; i. e., passenger as well as freight ships as far as they do not try to escape or offer resistance, only after passengers and crews have been accorded safety.

(3) All cases of destruction of enemy merchant ships in the Mediterranean in which German submarines are concerned are made the subject of official investigation and, besides, submitted to regular prize court proceedings. In so far as American interests are concerned, the German Government will communicate the result to the American Government. Thus, also, in the *Persia* case if the circumstances should call for it.

(4) If commanders of German submarines should not have obeyed the orders given to them, they will be punished; furthermore, the German Government will make reparation for damage caused by death of or injuries to American citizens. (1916 U. S. For. Rel., Sup., p. 144.)

*Submarines and the Washington Conference on Limitation of Armaments, 1921-22.*—In the early meetings of the Conference on the Limitation of Armaments, 1921-22, there had been discussion as to the use or abolition of submarines. There was also an understanding that if the use of submarines was not prohibited rules regulating their use would later be introduced.

Mr. Root said that the resolutions he was about to read were based on two lessons taught by the Great War. One fact which seemed very clear was that mere agreements between governments, rules formulated among diplomats in the course of the scientific development of international law, had a very weak effect upon belligerents when violation would seem to aid in the



attainment of the great object of victory. This has been clearly demonstrated in the war of 1914-1918.

Another fact established by the war was that the opinion of the people of civilized nations had tremendous force and exercised a powerful influence on the condition of the belligerents. The history of propaganda during the war had been a history of an almost universal appeal to the public opinion of mankind, and the result of the war had come largely as a response.

The public opinion of mankind was not the opinion of scientific and well-informed men but of ill-informed men who formed opinions on simple and direct issues. If the public could be confused, public opinion was ineffective; but if the public was clear on the fundamentals of a question, then the opinion of mankind was something which no nation could afford to ignore or defy.

The purpose of the resolutions he was about to read was to put into such simple form the subject which had so stirred the feelings of a great part of the civilized world that the man in the street and the man on the farm could understand it.

The first resolution, Mr. Root said, aimed at stating the existing rules, which, of course, were known to the committee, but which the mass of people did not know, in such a form that they would be understood by everyone.

Mr. Root then read the following:

"I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:

"1. A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured.

"A merchant vessel must not be attacked unless it refuses to stop for visit and search after warning.

"A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

"2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested.

"The signatory powers invite the adherence of all other civilized powers to the foregoing statement of established law to the end that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents."

This, Mr. Root said, was a distinct pronouncement on the German contention during the war in regard to the conflict between the convenience of destruction and the action of a belligerent under the rules of international law. (Conference on Limitation of Armament, 1921-1922, p. 594.)

The preamble of Mr. Root's resolution was in part embodied in the preamble of the treaty as finally adopted by the conference and in part embodied in Article I. The proposed treaty, which was not ratified, clearly states that it desires "to make more effective the rules adopted by civilized nations," and in Article III provides penalties for failure to observe these rules. These penalties were to be applicable not alone to those in the submarine service but to all branches or to "any person in the service of any power." The ratification of this treaty would have made the rules and the sanction general.

The preamble of the proposed treaty stated that it is the desire of the five powers signing the treaty "to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war."

Article I, if ratified, would for the five powers declare certain "rules adopted by civilized nations," and that "the following are to be deemed an established part of international law."

The statements in Article I are not necessarily correct statements of the law, even though so declared by the five powers, as is evident from Articles II and III, which, if the rules are adopted, unnecessarily invite assent of other civilized powers, because, if "established," as stated in the English text of Article I, or, as "forming a part of," as stated in the French text, no assent would be necessary, but could be assumed.

Neutrals and noncombatants may be on either belligerent or neutral merchant vessels. In Article I (1) there is no distinction made as to whether the merchant vessel is under neutral or belligerent flag, and there is unquestionably a difference in the permissible treatment of vessels under neutral and under belligerent flags.



An enemy merchant vessel under existing international law may be seized without previous orders to submit to visit and search. Article I of the treaty provides that a merchant vessel, without distinction as to flag, "must be ordered to submit to visit and search before it can be seized," thus introducing a new limitation applying to all vessels of war. Further, it has been common to seize even neutral merchant vessels without visit and search if evidence in possession of the vessel of war is sufficient to warrant seizure, on orders from the Government, or on suspicion, at the risk of the seizing party, which might be contrary to the provision of Article I.

Article I does not, however, necessarily *require* visit and search before seizure, but does require that the vessel "be ordered to submit to visit and search to determine its character before it can be seized." Often it is not the character of the vessel that is in question but the nature of the cargo, the destination, etc. A strict interpretation places a still further limitation upon the action of the seizing vessel that the visit and search be to determine the character of the merchant vessel, and in the division (2) this is stated to be among "the universal rules," non-conformity to which requires that the vessel be allowed to proceed.

The general implication from the wording is that the rules of Article I are to be deemed to be established "for the protection of lives of neutrals and noncombatants," whereas the rules in regard to visit and search have been developed primarily for the dealing with property rather than for protection of life.

While the original proposition of Mr. Root stated that the merchant vessel "must be ordered to stop for visit and search to determine its character before it can be captured," in the final text this word "captured" was changed to "seized." Mr. Hanihara had suggested the change from "capture" to "seize."

The original proposition of Mr. Root also stated: "A merchant vessel must not be attacked unless it refuse to

stop for visit and search after warning." To this was later added the words, "or to proceed as directed after seizure."

In the next clause there was no change.

In the last paragraph numbered (2), the word "capture" at the end of the paragraph was changed to "seizure." The word "capture" in the second clause was not changed.

Mr. Root at the meeting of December 29, 1921, speaking of Resolution I, said:

This article did not purport to be a codification of the laws of nations as regards merchant vessels, or to contain all the rules. It said that the following were to be deemed among the existing rules of international law.

Speaking further of these rules of Resolution I, Mr. Root said: "The public opinion of the world said that the submarine was not under any circumstances exempt from the rules above stated; and if so, a submarine could not capture a merchant vessel." Mr. Root said:

Resolution I also explained in authorized form the existing law and could be brought forward when the public asked what changes were proposed. (Conference on the Limitation of Armament, p. 618.)

Sir John Salmond, while not doubting the substantial accuracy of the resolutions proposed by Mr. Root, regarded them as not free from ambiguities and formal defects. He asked whether under Resolution I, stating that "'a merchant vessel must not be destroyed unless the crew and passengers had been first placed in safety,' was this intended to give absolute immunity from attack to the merchant ship unless the crew and passengers were first placed in safety, even although the ship had refused to stop on being warned? Read literally, this would be the effect of the rule."

Senator Lodge said: "The rules laid down by Mr. Root, especially in Resolution I, were elementary. Anyone who had read a textbook of international law knew them." (Ibid. p. 620.)



Mr. Hughes said:

Such a declaration as the one proposed in the first resolution would go to the whole world as an indication that, while the committee could not agree on such limitation, there was no disagreement on the question that submarines should never be used contrary to the principles of law governing war. The adoption of the resolution might, furthermore, avoid misunderstanding on the part of those who were looking to the conference with great hope. It certainly could not be considered as a vain declaration, after the experiences with submarines which the powers there represented had had and the feelings engendered by those experiences, to declare in the most precise terms that the rules of international law should be observed. He believed that such a declaration would be of the greatest value. (*Ibid.* p. 636.)

When the drafting subcommittee reported on January 5 on the Resolutions I and II, which subsequently became Articles I and II of the treaty, Mr. Root stated that—

the subcommittee had agreed unanimously on these two resolutions, but that Senator Schanzer had requested that the following entries be made in the minutes of the subcommittee (regarding Resolution I):

“It is declared that the meaning of article 2 is as follows: Submarines have the same obligations and the same rights as surface craft.”

And:

“With regard to the third paragraph of article 1, it is understood that a distinction is made between the deliberate destruction of a merchant vessel and the destruction which may result from a lawful attack in accordance with the rules of the second paragraph. If a war vessel, under the circumstances prescribed in paragraph 2 of article 1, lawfully attacks a merchant vessel, it can not be held that the war vessel, before attacking, should put the crew and passengers of the merchant vessel in safety.” (*Ibid.*, p. 686.)

Senator Schanzer stated, in addition, that the Italian delegation understood the term “merchant vessel” in the resolution to refer to unarmed merchant vessels. (*Ibid.*, p. 688.)

As Mr. Root had stated of this first article: “The first was a declaration of existing law and created nothing, merely certifying to what existed.” (*Ibid.*, p. 640), and as Sir John Salmond, also a distinguished jurist, has said he did not find the resolutions “free from ambiguities,”

and as the Japanese delegation, as well as the Italian, had raised questions, there might be proper room for doubt as to whether the first resolution clearly stated the existing law.

There was also a difference of opinion between Senator Schanzer and Lord Lee as to armed merchant vessels.

Lord Lee said he would now develop his second point. He was not sure if he had understood Senator Schanzer to say that the Italian delegation only accepted Resolution I on condition of a drastic change in international law under which merchantmen would not have the right to be armed against attack from any quarter. The arming of merchant ships was not a purely British practice; it was recognized in the Italian Code of 1877, which laid down that a merchant ship which was attacked might be ordered to defend itself and even to seize the enemy. He did not suppose that Senator Schanzer proposed to destroy the privilege allowed the merchantmen to defend themselves.

Senator Schanzer said that he would like to observe, with respect to what Lord Lee had said, that a limitation of the armament of auxiliary vessels had already been fixed. It had been agreed that they might not carry guns of more than 8-inch caliber. No rules, however, had been established governing the principles to be applied to merchant vessels, nor had they been forbidden to carry armament above a certain caliber. This omission might be dangerous, and even change their character. There were merchant vessels of 45,000 tons which might carry armament even heavier than 8 inches. Were these merchant vessels or not? The committee had established that a submarine should not attack a merchant vessel except in conformity with a resolution which had been adopted. Yet a merchant ship with guns was a war vessel. Might not a cruiser attack such a vessel? This was a point which Senator Schanzer believed should be cleared up. He said that he could not agree that a merchant vessel, even one armed with 6-inch guns, had rights which a surface cruiser must respect. It was aimed to lay down rules for the advantage of merchant vessels, not of vessels of war. He said that he felt that a declaration was necessary concerning this matter.

Lord Lee said he thought the difference between Senator Schanzer and himself was not really so great as appeared. Senator Schanzer appeared to him, perhaps, to have confused two things. It had been considered absurd to limit the armament of light cruisers and not to impose any limitation on the armament of merchant ships. When this question, which was a purely



technical one, came to be discussed he would be willing to apply the principle that the armed merchant cruiser must not be more powerful than the light cruiser. He understood, however, that Senator Schanzer had said that merchant ships must not be armed at all. That would involve an alteration of international law which the British Empire delegation could not possibly accept.

Senator Schanzer said he did not deny that under the existing rules of international law a merchant vessel might properly carry a limited armament for defensive purposes, but he wished to say that the Italian interpretation of the term "merchant vessel" took into account this limitation. He therefore repeated that the Italian interpretation was in accord with his preceding declaration and with the existing rules of international law.

The chairman stated that he supposed that this subject, which presented endless opportunities for exposition, might be left with the suggestion that under this resolution merchant vessels remained as they now stood under the existing rules of law, with all their rights and obligations; that the resolution then undertook to state what might be done by submarines in relation to merchant vessels thus placed. The chairman thought it hardly necessary that the committee should enter into a discussion of the question. Although he had no desire to preclude discussion of any sort, yet he hardly thought it necessary to enter into a review of all the rules of international law as to merchant vessels and their rights and obligations. He assumed that all the representatives present accepted the proposition that merchant vessels, as merchant vessels—a category well known—stood where they were under the law, and that this resolution defined the duties of submarines with respect to them.

The chairman thereupon put Resolution I to vote.

The chairman assented on behalf of the United States.

Mr. Balfour assented for the British Empire.

Mr. Sarraut said that the French delegation would give its full adherence to Resolution I, but that an interesting discussion had just taken place, the results of which he had not quite understood. He suggested that if Senator Schanzer's statements were not attached to the resolutions they should be recorded in the minutes.

The chairman replied that the question was on the adoption of the resolution and asked whether France assented.

Mr. Sarraut replied that it did.

Senator Schanzer, speaking for Italy, and Mr. Hanihara, speaking for Japan, assented.

The chairman stated that Resolution I was unanimously adopted. (*Ibid.*, p. 690-694.)



By Article II all other civilized powers were invited to assent to the rules of Article I as being a statement of established law, so that "there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents."

In speaking of Article III, which makes violation of existing law piracy, Mr. Root said: "They were not making law, they were making a declaration regarding existing law, and that necessitated no limitation at all to the powers that were here." (*Ibid.*, p. 720.) It is difficult to determine under what authority five powers, however humane, might have presumed to decide for other powers the penalties for acts when they have not been consulted upon the formulation of the law defining these acts.

In voting on Article III—

Senator Schanzer said that he accepted in the name of the Italian delegation the new formula as worked out by Mr. Root and Sir John Salmond, which gives entire satisfaction, as its wording had the effect of extending the sanctions of trial and punishment to all persons violating the rules of law laid down in the first resolution, without distinction.

The chairman asked whether any further discussions were desired. No reply being made, he said that the matter would be put to vote, whereupon the delegations of the United States of America, the British Empire, France, and Italy assented.

Mr. Hanihara said that before speaking for the Japanese delegation he would like to be enlightened as to the exact meaning of the words "punishment as if for an act of piracy."

The chairman said he assumed the phrase to mean that violation of the laws of war, thus declared, should be treated as amounting to an act of piracy and that the person violating the laws would be subject to punishment accordingly.

Mr. Root interposed that such a person would not be subject to the limitations of territorial jurisdiction. The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished in any country. That was the really important point. (*Ibid.*, p. 728.)

In presenting the treaty in its final form to the fifth plenary session, February 1, 1922, Mr. Root said :

You will observe that this treaty does not undertake to codify international law in respect of visit, search, or seizure of merchant vessels. What it does undertake to do is to state the most important and effective provisions of the law of nations in regard to the treatment of merchant vessels by belligerent war-ships, and to declare that submarines are under no circumstances exempt from these humane rules for the protection of the life of innocent noncombatants.

It undertakes further to stigmatize violations of these rules, and the doing to death of women and children and noncombatants by the wanton destruction of merchant vessels upon which they are passengers, as a violation of the laws of war which, as between these five great powers and all other civilized nations who shall give their adherence thereto, shall be henceforth punished as an act of piracy. (Ibid., p. 268.)

The statement that the following is an established part of international law, viz, "A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized" is not in accord with the facts at present or prior to the war.

Certainly this was not the rule in regard to enemy merchant vessels which might be seized as such without orders to submit to visit and search. The Japanese and other rules prescribe: "All enemy vessels shall be captured." Visit and search of enemy merchant vessels was to avoid violation of any neutral rights.

A neutral merchant vessel might be seized at any time outside of neutral jurisdiction, but in such case the state making the seizure assumed all risk, and visit and search was to avoid risk. If a neutral merchant vessel was known to the belligerent to have violated blockade, carried contraband, or to have engaged in unneutral service, it could be seized without being ordered to submit to visit and search.

This visit and search may not be solely to determine the character of the ship, for this may be known already, but to determine its destination, cargo, etc.

In 1799, Sir William Scott, in the case of the *Maria*, said:

That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. (1, C. Robinson's Admiralty Reports, 340.)

This statement did not mean that the merchant vessel had a right to demand that it should be ordered to submit to visit and search before seizure, but that the belligerent cruiser had a right to visit and search, and the belligerent cruiser also had, and has often exercised, the right of seizure without visit and search. The visit and search has been resorted to to avoid liability of making an illegal seizure. If a cruiser cares to take the risk of illegal seizure it may do so at any time, without visit and search, under the law existing in 1922 and until such treaty should be generally ratified.

The next clause provides:

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure. (Conference on Limitation of Armament, p. 1608.)

The French version of this is equally official with the English, but the idea is more nearly in accord with the law:

Un navire de commerce ne peut être attaqué que si, après mise en demeure, il refuse de s'arrêter pour se soumettre à la visite et à la perquisition, ou si, après saisie, il refuse de suivre la route qui lui est indiquée.

It is, however, not a "refusal" to come to for visit and search, but merely a failure to come to that renders the vessel liable under nearly all regulations.

The word "refuse" is, however, a fortunate one, as under this phraseology liability under the Kirkwall practice would not easily arise. A vessel might be directed to proceed to Kirkwall, or some other port, and might not "refuse," but might after a time depart from the



route indicated. As this clause, "or to proceed as directed after seizure," did not occur in the original draft it may be inferred that it was introduced to gain recognition of an extension of the Kirkwall practice, which certainly was not, and is not, "an established part of international law." If the seizing vessel accompanies the seized merchant vessel or puts a prize crew on board, then the law is as stated.

The paragraph stating: "A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety," manifestly is not intended to be a general prohibition, because the preceding paragraph permits by implication destruction under certain conditions.

This proposed treaty of 1921-22 in relation to the use of submarines and noxious gases in warfare failed of adoption and the regulation of the use of submarines was left for later determination.

*American advisory committee, Washington Conference on the Limitation of Armament.*—A subcommittee investigating and making a report in regard to submarines to the American advisory committee at the Washington Conference, 1921, said:

The rules of maritime warfare require a naval vessel desiring to investigate a merchant ship first to warn her by firing a shot across her bow, or in other ways, and then proceed with the examination of her character, make the decision in regard to her seizure, place a prize crew on her, and, except under certain exceptionable circumstances, bring her into port, where she may be condemned by a prize court. \* \* \*

Assuming that a merchant ship may be halted by a submarine in a legitimate fashion, it becomes difficult because of limited personnel for the submarine to complete the inspection, place a prize crew on board, and bring her into port. It is also difficult for her to take the passengers and crew of a large prize on board should circumstances warrant sinking the vessel. However, these remarks are applicable to small surface crafts as well. (Conference on the Limitation of Armament, p. 494.)

*Inability to afford place of safety.*—Manifestly the argument that a vessel of war because weak should have

special belligerent rights as regards neutrals or opposing belligerents has little weight. Professor Hyde, in referring to submarines, has said:

Mere incapacity of a naval submarine to offer a place of refuge on its own decks does not justify a disregard of the safety of the persons aboard the enemy merchantman which has surrendered or obeyed a signal to stop. It indicates rather a limitation of the right to destroy the ship until by some process the safety of its occupants has been assured. Should a small surface craft, such as a typical destroyer, or a naval vessel even more diminutive, fall in with an enemy passenger liner having 2,000 persons aboard, the inability of the former to offer a place of refuge to a majority of those persons, or to spare an adequate prize crew, would not in itself be deemed to justify the demand that the occupants of the liner take to the boats, or otherwise jeopardize their safety in order to permit the destruction of the vessel on which they were carried. The submarine is subject to the same duty. (2 Hyde, International Law, p. 482.)

*Summons.*—In many of the old treaties it is stipulated that a visiting vessel shall not come nearer to the visited vessel than a cannon shot, though some prescribe half a cannon shot. The requiring that the national flag should be flown when firing a gun in action was general. These rules were developed when the range of guns was short, and the rules were not universal though they might be regarded as general. With the increase in range of guns, it is not possible to send with safety and convenience a visiting party even half the distance which a shot may cover and no specified distance is now required. The reason for the early precautions have largely passed with pirates and privateers. While the summoning or affirming gun is often fired, other methods are equally valid. The purpose of the summoning gun was to make known to the summoned vessel that the summoning vessel desired her to come to and there was the implied threat that force would be used to bring the vessel to if the summons was manifestly disregarded and this could lawfully be done. Any other method of effecting summons would be equally lawful, as by signal or otherwise,



but, of course, the summons must be received and must be understood. If certainly received and understood, the consequences of disregarding the summons would be the same whatever the means of communication.

*Detention.*—The terms capture, seizure, and detention are not uniformly applied or interpreted. Capture and seizure are often used interchangeably. In general it is maintained that a vessel of war should interfere as little as possible with neutral commerce and that the exercise of visit and search should not be made unnecessarily burdensome. If on visit and search no good ground for suspicion that the vessel is liable to capture is found, formerly it was held that the vessel should be allowed to proceed.

During the World War it was argued on various grounds, size, state of sea, danger from submarines, methods of shipment of cargo, etc., that the visit and search at the place where the vessel is summoned is not an adequate safeguard for belligerents. Detention on the ground of suspicion based on irregular papers or other evidence arising from the visit and search at the place where the vessel is brought to has been uniformly approved, but the adequacy of the grounds for suspicion might be contested. Cases had arisen where vessels were detained and taken from the place of bringing to when search had been interrupted by storm, threatened attack by the enemy, or force majeure.

A somewhat extreme interference arose in case of the *Montana* in 1915. The statement of the case as reported in the decision by His Majesty's Commercial Court at Malta in Prize is as follows:

Action by the Archipelago American Steamship Co., the owners of the steamship *Montana*, against the commanding officers of H. M. S. *Harrier* and H. M. S. *Triad*, claiming damages for the detention of their vessel.

On April 15, 1915, the *Montana* left the Piræus, having on board 90,000 kilos of common soda consigned to Vourla, in Turkey. Before accepting the said consignment the master and ship's



agent communicated with the British Legation at Athens and received an assurance from the British Minister that common soda was not contraband and might safely be carried to the proposed destination. In the course of her voyage the *Montana* was stopped by H. M. S. *Harrier* in the Doro Channel and ordered to Mudros for examination. The naval authorities at Mudros, having no means at their disposal of analyzing the cargo, sent the vessel to Malta, where she arrived on April 22. On April 24 the Government analyst reported that the cargo did not come within the list of sodium substances included in the schedule of contraband, and on April 25 the *Montana* was released and given a clearance certificate for Vourla. On May 4 the vessel, after calling at Chios, was again stopped by H. M. S. *Triad*, but was allowed to proceed to Vourla after her holds had been sealed, which prevented the discharge of the cargo. The master of the vessel alleged that the commanding officer of the *Triad* ordered him to leave Vourla within 24 hours, but this was denied by the naval officer in question. (3 Grant, Br. and Col. Prize cases, p. 340.)

This court decided that "the naval authorities, therefore, acted within their powers in detaining the ship and sending her for examination to Malta."

Later the court states that in regard to sealing the cargo to prevent discharging at Vourla "it is impossible to define which facts constitute reasonable suspicion, as they are so multifarious as to render it impossible to give an exhaustive enumeration of all," and also as to the contention that the order was against the principles of international law, "It does not, however, seem repugnant to those principles to hold that the right of visit and search includes that of securing such part of the cargo which may appear suspicious and of preventing its being discharged as at a given port, without actually seizing it." The court added :

Recent developments in the course of the present war have clearly shown that it is not possible in all cases to exercise the right of visit and search in a satisfactory way owing to the ease with which contraband may be concealed in bales, passengers' luggage, and other receptacles, especially in large ships, and owing to the danger from enemy submarines.

The claim for damages made by the owners of the *Montana* was, according to the court, not substantiated.

*Capture.*—Just what may be necessary to constitute capture may at times be difficult to determine. The British judgment by the judicial committee of the Privy Council in the case of the *Pellworm*, which in 1917 with other ships had passed into Dutch territorial waters before they were boarded, gives an opinion as to the nature of capture, and the discussion is extended and significant:

In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done, *deditio* is complete, even although there may be on the part of the prize an intention to seize an opportunity of escaping should it present itself. Submission must be judged by action, or by abstention from action; it can not depend on mere intention, although proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary—*La Esperanza*. (1 Hag. Adm., at p. 91.) A ship may be truly captured, although she is neither fired on nor boarded—*The Edward and Mary*—if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any rate taken as prize when resistance has completely ceased. It was contended before their lordships by counsel for the Crown that hauling down the flag was conclusive in the present case, or, at least, was conclusive when taken in conjunction with stopping the engines as ordered. It was said to be an unequivocal act of submission, as eloquent as the words "I surrender" could have been, an act which could not be qualified by any intention which did not find expression in action. This is to press *The Rebeckah* beyond what it will bear, for there the facts showed, that after the act of formal submission by striking colors there was no discontinuance of that submission either effectively or at all, whereas Sir William Scott intimates that, if any attempt had been made to defeat the surrender he would not have treated the *deditio* as complete until possession was actually taken. It is true that by tradition, when ships are engaged in combat, striking the colors is an accepted sign of surrender, but to do so without also ceasing resistance is to invite and to justify further severe measures by the victori-



ous combatant. In the case of a merchantman, where the traditions of commissioned men-of-war are not of equal application, the hauling down of the flag, like any other sign or act of submission, is to be tested by inquiring whether the prize has submitted to the captor's will. What a combatant seeks to intimate by acts signifying surrender is first and foremost that he ceases to fight and submits to be taken prisoner; what a merchantman intimates is that she means to do as she is told, and that the chattel property may be captured in prize, although the seamen in charge of it are not made prisoners or placed under personal restraint. In the present case, according to evidence given for the Crown, the hauling down of their flags by the German steamers was accompanied by a change of course toward the land; and as it preceded any British signal by flag or cannon shot, it was in the circumstances anything but a clear intimation of submission. On the contrary, it is obvious that the German ships continued to move toward and shortly crossed the 3-mile limit, and that this was neither inadvertent nor was incapable of being prevented. They had not abandoned the intention of escaping, nor had they arrested their movement toward the region of safety. They submitted just so far as to minimize the risk of being fired on; they disobeyed orders just so far as to insure that the ships would of themselves glide or be carried over the line. They were already heading toward the territorial waters and desired to obtain whatever advantage might be derivable from getting within them. This was why they did not obey the order to alter course to the westward. It is shown that they could not have done so. Under these circumstances their lordships see no reason to differ from Lord Sterndale's conclusion that the vessels were not captured until they had entered Dutch waters, for up to that time they were endeavoring to escape and were resisting or evading submission to the captor's will. (3 Grant, Br. and Col. Prize Cases, p. 1053.)

*Classes of ships.*—A review of the discussion on privateering, exemption of private property at sea, conversion of merchant vessels into vessels of war, armed merchant vessels, subsidized vessels, national merchant marine and kindred subjects shows the need of a redefinition of some of these classes. This review also shows that the line should for purposes of war and for observance of neutrality be on the basis of combatancy. If a vessel is a combatant vessel it should be treated as such both by



belligerent and by neutral. While the distinction between armament for defensive and offensive purposes was ostensibly made in the World War, in most cases the practice reduced to the exercise of judgment by the commander of the armed vessel as to his ability to sink or defeat an approaching vessel. The result was unrestricted maritime warfare with disregard of belligerent and neutral rights.

The desideratum seems to be a clear distinction between combatant and noncombatant vessels. Such a distinction is necessary both for neutral and belligerent. Clearly a vessel of belligerent nationality should be either noncombatant or combatant if a neutral is to maintain an unquestioned neutrality. The best interests of the belligerents would as between themselves be likewise served by such definition. Combatant vessels would be liable to attack without warning; noncombatant vessels would be liable only to visit and search and capture. Noncombatant vessels could be sunk under exceptional circumstances and after personnel had been placed in safety; noncombatant vessels belonging to the state would be treated as public property.

Referring to The Hague Convention in regard to days of grace in which the term "*bâtiments de guerre*" is used J. A. Hall says:

The words "*bâtiments de guerre*" are probably intended here to cover only fighting ships, and do not include auxiliary vessels not employed in acts of aggression. But even so, it is impossible to say in general terms what details of construction should be taken to indicate that the vessel is intended to be converted into a ship of war, for most fast vessels, such as mail steamers and large liners, are easily converted into formidable commerce destroyers. Indeed, the difficulty will be almost insoluble in the future, if the practice of putting special construction into merchant ships to facilitate their defensive armament in time of war becomes general. Difficulties may also arise in the case of vessels of smaller size, such as trawlers, which play so important a rôle in all mining operations. It is not, however, the capacity of the vessel to be converted, but the intention by the Government to make such conversion to war uses, which is the test. Each case

will have to be decided on that very vague and unsatisfactory ground, but the fact that the vessel is contained in the navy list of its country or is in receipt of a government subsidy should certainly be sufficient proof of intention to warrant condemnation. Fortunately these problems will seldom confront the naval officer, but will be left for the prize court to decide. For if no days of grace are granted all enemy vessels should be captured and sent in for prize proceedings, for if not liable to condemnation they are at any rate subject to detention for the duration of the war. If, on the other hand, there is a period of grace, the problem can equally well be prevented from harassing the naval officer by some such method as that adopted in the British Order in Council set out above, namely, the exclusion from the privilege of all vessels over a certain size or speed or otherwise specially suitable for conversion into ships of war.

Apart from this question of conversion, it is lawful for a naval officer, exercising the right of visit and search in time of war, to capture and send in for condemnation as prize every enemy merchant ship which he may meet with outside neutral territorial waters after the expiration of any days of grace his government may have granted, or, if none are granted, immediately after the declaration of war, unless he is satisfied either that she left her last port of call before the existence of the war could be known there and is still ignorant of it, or that she had sailed from a port of her enemy with a passport and has not willfully made any material deviation from the course there laid down for her. If she has failed to comply with the terms of the passport without a reasonable excuse, she should be seized. The first exception, that of ignorance of the war, did not apply in the Great War, as already described, owing to the two belligerents, Germany and Russia, having refused to agree to it at The Hague Conference. In any war in which the convention was fully in force, unless it was decided to exercise the minor right of detention under article 3, an officer visiting an enemy ship which was ignorant of the war, should enter in the ship's log the fact of the visit and of the state of war, specifying the date and place of the visit, together with the names of his ship and her commanding officer, signing the entry with his own name and rank. The visited vessel will then be liable to be seized as prize, if she thereafter enters or attempts to enter a port of her enemy, for she is no longer in a position to plead ignorance and should make for a place of safety. If her destination is a port of her own country, it may be necessary, owing to a blockade, to divert her to another port, or for other military reasons to prescribe her route, in which case any such orders should be also entered in her log. She will then



be liable to capture and condemnation as prize if she is subsequently discovered to be acting in contravention of such orders without reasonable excuse. (J. A. Hall, *The Law of Naval Warfare*, p. 36.)

Hall also says:

Hostilities are mainly conducted by the regular navy of a state, vessels built and equipped simply and solely for the purposes of war. They fly a distinctive flag—in the British Navy the white ensign. They alone are entitled to attack the enemy, to exercise the right of visit and search, or to take prizes. These are the fighting ships. Other vessels, such as transports, colliers, oil-fuel vessels, tugs, and so forth, required for the numerous subsidiary nonmilitary services which the working of a great navy demands, constitute the second class, known in the British Navy as fleet auxiliaries. Whether they have been merely taken over on charter from the merchant service for the purposes of the war or have always been in the sole ownership and employment of the naval authorities, they are not permitted to engage in acts of war, nor do they fly the flag of a fighting ship. Whether they fly a special flag or the flag of their merchant service the rights and duties of their position remain the same; in regard to the enemy they are in the position of merchant ships; that is to say, they may be captured or destroyed and may resist if attacked, but must not themselves begin an attack, but in regard to neutrals and the use of their ports and waters they are in the same position as the fighting ships. (*Ibid.* p. 48.)

This right to exercise forcible resistance must clearly come into operation the moment the hostile warship proceeds to take any step toward effecting capture; that is, approaches with a view to exercising the right of visit and search or to bringing her guns to bear. It is perfectly lawful to presume her hostile intent without waiting for her to announce it formally by signal or by firing a warning shot. This is as true with regard to hostile submarine as to surface vessels, especially if they are notoriously in the habit of indulging in the illegal practice of torpedoing all merchant vessels at sight, which was the policy adopted by German warships of this class during the Great War. (*Ibid.* p. 54.)

*State control of shipping.*—Subsidies and other special measures have been resorted to by states desiring to control merchant shipping. These have developed according to the supposed interests of the states concerned. Sometimes mercantile interests, sometimes political plans,



and sometimes war exigencies have determined the attitude of states toward the mercantile marine. The World War dislocated the commerce of the world to such an extent that unusual measures were undertaken, and attempts to justify the measures sometimes strained the ordinary processes of international negotiation and led to action which made world conditions even more unstable.

*Control of shipping by the United States.*—By the act of June 15, 1917, the President of the United States was authorized:

(c) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in process of construction or hereafter constructed, or any part thereof, or charter of such ship. (40 U. S. Stat., p. 182.)

This was an act "to supply urgent deficiencies in appropriations for Military and Naval Establishments on account of war expenses."

The act also provides:

The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

The same act made provision for the operation of ships thus acquired by agencies other than the Army and Navy Departments. Ships were taken over by the President under this authorization and at times the United States represented by the United States Shipping Board became "the possessor" of the vessel.

*Certificate of requisition.*—The documentary evidence is shown in the certificate of requisition.<sup>1</sup>

*Charters.*—Requisition charters made provision for compensation and for the operation of these vessels under time charters if they were taken over by the Shipping Board or under certain other conditions for operation under the bare-boat form.

*The Shipping Board.*—The United States Shipping Board, instituted in 1916 to build up a merchant marine

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See footnote on page 46.

# 46 LONDON NAVAL TREATY, ART. 22, AND SUBMARINES

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THE UNITED STATES OF AMERICA DEPARTMENT OF COMMERCE BUREAU OF NAVIGATION		RADIO CALL LETTERS
<h2>Certificate of Requisition</h2>		
<small>In Pursuance of the following Proclamation of the President of the United States, promulgated March 20, 1918.</small>		
<b>By the President of the United States of America: A PROCLAMATION.</b>		
<p>Whereas, the law and practice of nations accords to a belligerent power the right in times of military exigency and for purposes essential to the prosecution of war, to take over and utilize neutral vessels lying within its jurisdiction;</p> <p>And whereas the act of Congress of June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for the other purposes," confers upon the President power to take over the possession of any vessel within the jurisdiction of the United States for use or operation by the United States;</p> <p>Now therefore, I, Woodrow Wilson, President of the United States of America, in accordance with international law and practice and by virtue of the act of Congress aforesaid, and as Commander in Chief of the Army and Navy of the United States, do hereby find and proclaim that the imperative military needs of the United States require the immediate utilization of vessels of Netherlands registry, now lying within the territorial waters of the United States; and I do therefore authorize and empower the Secretary of the Navy to take over on behalf of the United States the possession of and to employ all such vessels of Netherlands registry as may be necessary for essential purposes connected with the prosecution of the war against the Imperial German Government. The vessels shall be manned, equipped, and operated by the Navy Department and the United States Shipping Board, as may be deemed expedient; and the United States Shipping Board shall make to the owners thereof full compensation, in accordance with the principles of international law.</p> <p>In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.</p> <p>Done in the District of Columbia, this twentieth day of March, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.</p>		
By the President:		WOODROW WILSON.
ROBERT LANSING, Secretary of State.		
<p>has taken and subscribed the required oath, and has sworn that the United States of America represented by the United States Shipping Board is the only possessor of the vessel called the _____ of _____</p> <p>whereof _____ is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1 _____ at _____ of _____</p> <p>as appears by _____ and _____</p> <p>has certified that the said vessel is a _____ deck, _____ mast, a _____ head, and a _____ stern; that her register length is _____ feet, her register breadth _____ feet, her register depth _____ feet, her height _____ feet; that she measures as follows:</p>		
<p>Capacity under tonnage deck _____</p> <p>Capacity between decks above tonnage deck _____</p> <p>Capacity of holdovers on the upper deck, viz: Forecastle _____ bridge _____ poop _____ break _____</p> <p>houses—round _____, side _____, chart _____, radio _____, cross hatchways _____ light and air _____</p> <p style="text-align: right;"><b>GROSS TONNAGE</b> _____</p>		TONS
<p><b>Deductions under Section 4153, Revised Statutes, as amended:</b></p> <p>Crew space _____ Master's cabin _____ Boatman's stores _____</p> <p>Steering gear _____ Anchor gear _____ Donkey engine and boiler _____ Radiophone _____</p> <p>Chart house _____ Donkey engine and boiler _____ Radiophone _____</p> <p>Storage of sails _____ Propelling power (actual space) _____</p> <p style="text-align: right;">Total Deductions _____</p> <p style="text-align: right;"><b>NET TONNAGE</b> _____</p>		
<p>The following-described spaces, and no others, have been omitted, viz: Forepeak used for water-ballast _____, afterpeak used for water-ballast _____, open forecabin _____, open bridge _____, open poop _____, open shelter-deck _____, anchor gear _____, steering gear _____, donkey engine and boiler _____, light and air _____, wheelhouse _____, galley _____, condenser _____, water-cisterns _____, cabins _____</p>		
<p>the said _____ has agreed to the description and admeasurement above specified.</p> <p style="text-align: center;">GIVEN under my hand and seal, at the Port of _____, this _____ day of _____, in the year one thousand nine hundred and _____</p>		
<p>Place for Seal of Naval Officer</p> <p style="text-align: center;">Naval Officer</p>		<p>Place for Seal of Collector of Customs</p> <p style="text-align: center;">Collector of Customs</p>



to meet American needs on the outbreak of war, became an agency for organizing the shipping to promote the ends of the war. As Prof. J. R. Smith, in *The Influence of War on Shipping*, says: "The official mind replaces supply and demand." Ships were allocated as to routes and employment. The taking over was on the outbreak of war for war purposes and the ships were run for war ends.

*Ships on time charter.*—While the time charter provides that a vessel operated by the owner for the United States is not a public ship but shall be subject to the laws governing merchant ships, this provision relates to domestic rules and might be acceptable to neutrals. This provision would not determine the attitude of a belligerent toward a vessel requisitioned by the United States and under a time charter, the first provision of which is that "the steamship shall remain in the service of the United States." The United States Shipping Board had large grants from the Public Treasury for the maintenance of these ships.

Subsidies, bounties, subventions, in one and another form, have been common and have placed vessels under obligation to the government with a possibility of control. It had been generally maintained that until the control had been assumed the vessel would be regarded as a private vessel, unless there was evidence to the contrary other than the existence of a subsidy in time of peace.

*Neutral attitude.*—A neutral state is not concerned with the public or private ownership of merchant vessels flying merchant flags of a belligerent state. It is, however, responsible for the treatment which it accords to vessels which are adapted to carry on hostilities.

*Belligerent attitude.*—The belligerents are concerned both as to ownership and as to character of vessels. If a vessel is a public vessel of an enemy and armed it may be attacked without warning because it would be within the category of vessels of war. If it is an unarmed public vessel (not of an exempt class, such as hospital ships),

it may likewise be attacked without warning if it is engaged in military operations as scouting, etc. The belligerent must for his own safety know whether a vessel of any nationality is concerned in the war.

*Shipping Board vessels.*—There has been much discussion as to the status of vessels of the United States Shipping Board during war. This question was discussed in the opinion of the United States and German Mixed Claims Commission in 1924. (Decisions and Opinions, p. 75; see also 1923 N. W. C., International Law Decisions, p. 189.)

The Shipping Board was established in pursuance of the act of the Congress of the United States of September 7, 1916 (39 Statutes at Large, 728), entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States, and for other purposes." The act as amended provided that the members of the board should be appointed by the President subject to confirmation by the Senate; that they should be selected with due regard for the efficient discharge of the duties imposed on them by the act; that two should be appointed from States touching the Pacific Ocean, two from States touching the Atlantic Ocean, one from States touching the Gulf of Mexico, one from States touching the Great Lakes, and one from the interior, but that not more than one should be appointed from the same State and not more than four from the same political party. All employees of the board were selected from lists supplied by the Civil Service Commission and in accordance with the civil service law. The board was authorized to have constructed and equipped, as well as "to purchase, lease, or charter, vessels *suitable, as far as the commercial requirements of the marine trade of the United States may permit*, for use as naval auxiliaries or Army transports, or for other naval or military purposes." \* \* \* The board was authorized to create a corporation with a capital stock of not to exceed \$50,000,000 "for the purchase, construction, equipment, lease, charter, maintenance, and operation of *merchant vessels in the commerce of the United States*." In pursuance of this latter provision the United States Shipping Board Emer-



gency Fleet Corporation (sometimes hereinafter referred to as Fleet Corporation) was organized under the laws of the District of Columbia with a capital stock of \$50,000,000, all fully paid and all held and owned by the United States save the qualifying shares of the trustees. Under the terms of the act, this corporation could not engage in the *operation* of vessels owned or controlled by it unless the board should be unable to contract with citizens of the United States for the purchase or operation thereof. \* \* \* The act taken in its entirety indicates that the controlling purpose of the Congress was to promote the development of an American merchant marine and also "*as far as the commercial requirements of the marine trade of the United States may permit*" provide vessels susceptible of "use as naval auxiliaries or Army transports, or for other naval or military purposes." \* \* \*

Following America's entrance into the war on April 6, 1917, Congress through the enactment of several statutes clothed the President of the United States with broad powers, including the taking over of title or possession by purchase or requisition of constructed vessels or parts thereof or charters therein and the operation, management, and disposition of such vessels and all other vessels theretofore or thereafter acquired by the United States. \* \* \* Under the requisition charter it was expressly stipulated that the vessel "*shall not have the status of a public ship*, and shall be subject to all laws and regulations *governing merchant vessels* \* \* \*. When, however, the requisitioned vessel is *engaged in the service of the War or Navy Department*, the vessel shall have the status of a public ship, and \* \* \* the masters, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States." At another point in the requisition charter it was stipulated that the master "*shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, except when the vessel becomes a public ship.*" \* \* \*

Construing the shipping act, the Executive orders of the President, and the provisions of an operating agreement similar to that hereinbefore described, the Supreme Court of the United States held a vessel *owned* by the Fleet Corporation but operated by an American national as an agent of the Shipping Board was a merchant vessel and subject to libel in admiralty for the consequences of a collision. It is apparent that a vessel either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by an agent of the United States under such an operating or man-

aging agreement as hereinbefore described was a merchantman and in no sense impressed with a military character.

The Mixed Commission's opinion was that the simple arming and manning by a gun crew would not convert a merchant vessel into "naval and military works or materials" as that phrase was used in the treaty of Versailles, but this opinion was not aimed at determining the status of such vessels in other respects. Indeed in this same opinion, in considering the case of the steamship *John G. McCullough*, requisitioned by the Shipping Board and turned over to the War Department and operated under its orders, it was said:

She possessed every indicia of a military character save that she was not licensed to be engaged in *offensive* warfare against enemy ships. Offensive operations on the seas was not her function. The fact that the legal title to her had not vested in the United States is wholly immaterial. She was in the possession of the United States. It had the right against all the world to hold, use, and operate her and was in fact operating her through its War Department by a master and crew employed by and subject in every respect to the orders of the War Department. She was actively performing a service for the Army on the fighting front. She possessed none of the indicia of a merchant vessel. The very requisition charter under which she was operating took pains to declare her a "public ship" and not a merchant vessel subject to the laws, regulations, and liabilities as such as was the *Lake Monroe*. She was at the time of her destruction being utilized for "other \* \* \* military purposes" within the meaning of that phrase as used in section 5 of the shipping act. She was impressed with a military character.

In the technical sense such a vessel had practically been converted into a vessel which would be in the category of a public ship impressed with a military character.

In the case of *Berizzi Bros. Co. v. Steamship Pesaro*, decided by the United States Supreme Court in 1926, referring to the case of *Schooner Exchange* (7 Cranch 116), it was said:

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omis-



sion is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange*, therefore, can not be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as warships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force. (271 U. S. 562.)

*Treatment of vessels.*—The classes of public merchant vessels, armed and unarmed, are comparatively new. The treatment of belligerent vessels would logically rest on the criterion, Are the vessels combatant or noncombatant? A belligerent can not legally demand that the personnel on a combatant vessel be spared. A belligerent may demand that the personnel on a noncombatant vessel be placed in safety. The question as to whether the title to a vessel is in a private, in a quasi private person of enemy nationality, or in the enemy state itself is a matter of minor importance, particularly since the national control of shipping in belligerent countries is probable in future wars. If, however, the principle of exemption of private property at sea from capture should be adopted, the question of title might become important.

Sir Frederick Smith in March, 1917, wrote:

Vessels belonging to the enemy state, and notably warships, may be attacked, captured, or destroyed by a belligerent man-of-war anywhere on the high seas or in the territorial waters of the contending belligerents, at any time and without notice. But

enemy merchantmen are not to be subjected to such summary and drastic treatment.

There are several reasons for such differentiation. In the first place, enemy merchantmen are not combatants. International law and practice have long recognized a line of demarcation between combatants and noncombatants both in war on land and in war on sea. (The Destruction of Merchant Ships under International Law, p. 15.)

Manifestly the sinking without notice of vessels unarmed and engaged in purely mercantile pursuits, even though the property of an enemy state, might bring no commensurate military advantage. If all publicly owned vessels were liable, the United States Shipping Board vessels could probably be sunk without notice. Transfer to private ownership after outbreak of war would doubtless be held invalid. Many questions would arise as to vessels partly public owned or subsidized.

*Ground of suspicion.*—*The Elve* and *The Bernisse* were two Dutch steamships engaged in carrying groundnuts from Senegal to Rotterdam, a transport approved by the French Government, and each consignment was accompanied by a sort of permit issued by the French colonial authorities. These vessels were stopped by a British cruiser off the Orkney Islands on May 20, 1917, and were ordered to go to Kirkwall, and on each a prize crew of an officer and three men was put to see that the order was carried out. The reason given was that the vessels did not have a British permit and that the cargo was in bulk and that "it would have been impossible to examine the ships at sea in order to find out whether there was anything hidden under the cargo."

At the time of the sending in of these Dutch steamships the Order in Council of February 16, 1917, was in effect:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the prize court.



2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods: *Provided*, That in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in article 1 shall arise.

3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

4. Nothing in this order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this order. (3 Grant, Br. and Col. Prize Cases, p. 771.)

While the vessels were en route to Kirkwall *The Elve* was sunk by a German submarine and *The Bernisse* was badly damaged.

In 1920 the judicial committee of the Privy Council, to which the case had come on appeal from a judgment against the Crown, said:

As there was in this case no ground whatever proved on which either ships or cargo could have been condemned as prize, any more than any ground for detaining them under the Order in Council, the question remaining is merely that of reasonable ground for the action taken. To show such ground the Crown rely on two points: First, they say that the detention was a legitimate exercise of the right of search. In this war it has been agreed that search at sea has been practically impossible, and sending into port for search has been almost universal. In this case, further, there was evidence that the search at sea for contraband hidden under the groundnuts would have been impossible. The President, however, has disposed of this point by saying that even if the officers might have suspected that something contraband was hidden under the groundnuts; in fact, they did not do so, and have never said that they did. They really only sent the vessels in because there was no green clearance. This seems a sufficient answer, and it is unnecessary to go further, but counsel for the respondents do further argue that ever for a search reasonable ground for suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is, of course, correct; but so little suspicion is required to justify a search that

their lordships are not prepared to say that if a boarding officer were to state that, finding the cargo to be in bulk, he thought that something might be hidden under it, and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. (Ibid.)

In referring to the case of the *Ostsee*, which arose in the Crimean War, the judicial committee said:

It was there held that to exempt captors from costs and damages there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. (Ibid.)

In referring later to this case, approval was given to the headnote, "That an honest mistake occasioned by an act of government will not relieve captors from liability to compensate a neutral."

From this deliberate decision of the highest British judicial authority it is evident that "a reasonable ground for suspicion must be shown" to render a vessel liable to search, though just what such ground might be is not decided.

*Bringing in of prize.*—Early instructions in regard to bringing in of prize are reviewed in Situation III of Naval War College International Law Situations of 1908, pages 68 to 70.

The Institut de Droit International at the Oxford session in 1913 formulated the following:

ART. 102. Le navire saisi doit être conduit dans un port de l'Etat capteur ou dans celui d'une puissance belligérante alliée, aussi proche que possible, susceptible d'offrir un abri sûr et ayant des communications faciles avec le tribunal des prises chargé de statuer sur la capture. Pendant le voyage la prise naviguera avec le pavillon et la flamme, insigne des navires militaires de l'Etat.

The Instructions issued to the Navy of the United States in 1917 prescribed in section 80 that—

80. Except under extraordinary circumstances, prizes shall be sent promptly to a port within the jurisdiction of the United States for adjudication. In general, a prize master with a crew shall be sent on board the prize for this purpose. If for any



reason this is impracticable, a prize may be escorted into port by the capturing vessel or by another vessel of war of the United States or of an ally. In this exceptional case the prize shall be directed to lower her flag and to steer according to the orders of the escorting vessel of war. The prize must obey the instructions of the escorting vessel, under pain of forcible measures.

Other regulations provide for escort of prize to port of adjudication. In early cases before prize courts, the intention of taking the prize had to be proven. The *animus capiendi* must be supported by fact. The master of a merchant vessel may be requested to navigate his vessel in accordance with certain directions, but the master is under no obligations to navigate in such manner. The consequences of refusal depend upon the adequacy of the force of the captor and failure to follow instructions may result in the consequences that follow resistance to capture.

While there may be problems arising from bringing vessels into port for prize proceedings and from bringing vessels into port for search, in both cases the responsibility rests upon the flag of the state bringing the vessel in, but the wrongful bringing in or detention may give ground for compensation. Whether certificates, "letters of assurance," "navicerts," or other documentation at the port of shipment will be accepted as proof of innocence in the future, when such proficiency in evading supervision outside neutral jurisdiction has been developed, as has been shown off the coast of the United States in circumventing regulations relating to liquor traffic, is open to question. The wit of man in evading man-made law has usually shown a development commensurate with that of the law, and there is always the possibility among states that undue interference may provoke effective retaliation. This may be specially potent in commercial relations in time of war.

When a merchant vessel is under the actual control of a vessel of war of a belligerent, there is no question as to the responsibility and liability, whether or not the bel-

ligerent vessel has acted in a strictly legal manner. If there is a reasonable ground for taking a vessel into port, it is usually admitted that there is no liability except to use reasonable care in navigation. In the case of *The Elve and The Bernisse* before the British courts. it was argued "that ever for a search reasonable ground for suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable" (3 Grant, Br. and Col. Prize Cases, p. 777), and the judicial committee of the Privy Council admitted that "in strictness this is, of course, correct; but so little suspicion is required to justify a search that their lordships are not prepared to say that if a boarding officer were to state that, finding the cargo to be in bulk, he thought that something might be hidden under it and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages." (Ibid.)

*British practice, 1914-1915.*—At the outbreak of the World War in 1914, it was expected that the laws of war previously recognized would be observed by the belligerents. Of this a paper presented to the British Parliament in January, 1916, said:

1. The object of this memorandum is to give an account of the manner in which the sea power of the British Empire has been used during the present war for the purpose of intercepting Germany's imports and exports.

#### I.—BELLIGERENT RIGHTS AT SEA

2. The means by which a belligerent who possesses a fleet has, up to the time of the present war, interfered with the commerce of his enemy are three in number:

- (i) The capture of contraband of war on neutral ships.
- (ii) The capture of enemy property at sea.
- (iii) A blockade by which all access to the coast of the enemy is cut off.

3. The second of these powers has been cut down since the Napoleonic wars by the Declaration of Paris of 1856, under which enemy goods on a neutral ship, with the exception of contraband



of war, were exempted from capture. Enemy goods which had been loaded on British or allied ships before the present war were seized in large quantities immediately after its outbreak; but for obvious reasons such shipments ceased, for all practical purposes, after August 4, 1914, and this particular method of injuring the enemy may, therefore, for the moment be disregarded.

No blockade of Germany was declared until March, 1915, and, therefore, up to that date we had to rely exclusively on the right to capture contraband.

## II.—CONTRABAND

4. By the established classification goods are divided into three classes:

(a) Goods primarily used for war-like purposes.

(b) Goods which may be equally used for either war-like or peaceful purposes.

(c) Goods which are exclusively used for peaceful purposes.

5. Under the law of contraband, goods in the first class may be seized if they can be proved to be going to the enemy country; goods in the second class may be seized if they can be proved to be going to the enemy government or its armed forces; goods in the third class must be allowed to pass free. As to the articles which fall within any particular one of these classes, there has been no general agreement in the past, and the attempts of belligerents to enlarge the first class at the expense of the second and the second at the expense of the third have led to considerable friction with neutrals.

6. Under the rules of prize law, as laid down and administered by Lord Stowell, goods were not regarded as destined for an enemy country unless they were to be discharged in a port in that country; but the American prize courts in the Civil War found themselves compelled by the then existing conditions of commerce to apply and develop the doctrine of continuous voyage, under which goods which could be proved to be ultimately intended for an enemy country were not exempted from seizure on the ground that they were first to be discharged in an intervening neutral port. This doctrine, although hotly contested by many publicists, had never been challenged by the British Government, and was more or less recognized as having become part of international law.

7. When the present war broke out it was thought convenient, in order, among other things, to secure uniformity of procedure among all the allied forces, to declare the principles of international law which the allied Governments regarded as applicable

to contraband and other matters. Accordingly, by the Orders in Council of August 20 and October 22, 1914, and the corresponding French decrees, the rules set forth in the Declaration of London were adopted by the French and British Governments with certain modifications. As to contraband, the lists of contraband and free goods in the declaration were rejected, and the doctrine of continuous voyage was applied not only to absolute contraband, as the declaration already provided, but also to conditional contraband, if such goods were consigned to order, or if the papers did not show the consignee of the goods, or if they showed a consignee in enemy territory.

8. The situation as regards German trade was as follows: Direct trade to German ports (save across the Baltic) had almost entirely ceased, and practically no ships were met with bound to German ports. The supplies that Germany desired to import from overseas were directed to neutral ports in Scandinavia, Holland, or (at first) Italy, and every effort was made to disguise their real destination. The power which we had to deal with this situation in the circumstances then existing was—

(i) We had the right to seize articles of absolute contraband if it could be proved that they were destined for the enemy country, although they were to be discharged in a neutral port.

(ii) We had the right to seize articles of conditional contraband if it could be proved that they were destined for the enemy Government or its armed forces, in the cases specified above, although they were to be discharged in a neutral port.

9. On the other hand, there was no power to seize articles of conditional contraband if they could not be shown to be destined for the enemy Government or its armed forces, or noncontraband articles, even if they were on their way to a port in Germany, and there was no power to stop German exports.

10. That was the situation until the actions of the German Government led to the adoption of more extended powers of intercepting German commerce in March, 1915. The allied Governments then decided to stop all goods which could be proved to be going to or coming from Germany. The state of things produced is in effect a blockade, adapted to the condition of modern war and commerce, the only difference in operation being that the goods seized are not necessarily confiscated. In these circumstances it will be convenient, in considering the treatment of German imports and exports, to omit any further reference to the nature of the commodities in question as, once their destination or origin is established, the power to stop them is complete. Our contraband rights, however, remain unaffected, though they, too, depend on the ability to prove enemy destination. (Statement



of the Measures Adopted to Intercept the Seaborne Commerce of Germany. British Parliamentary Papers, Misc., No. 2 (1916), p. 1.)

*Restriction of commerce by reprisals.*—While reprisals are aimed against an enemy, the belligerents in the World War did not hesitate to resort to measures which directly affected neutrals. So long as neutrals tolerated such action or merely wrote notes which could be answered somewhat at leisure by the belligerents, reprisals naturally extended so as to interfere more and more with what were previously regarded as neutral rights.

The British Order in Council of March 11, 1915, purporting to be replying to the German proclamation declaring the waters surrounding the United Kingdom a military area, in reprisal stated that His Majesty had "therefore decided to adopt further measures to prevent commodities of any kind from reaching or leaving Germany." This Order in Council was published in the London Gazette of March 15, 1915, and transmitted in a letter of the same date by the American ambassador to the Secretary of State. In a note of March 30 the American Secretary of State mentions this Order in Council as containing "matters of grave importance to neutral nations. They appear to menace their rights to trade and intercourse not only with belligerents but also with one another." \* \* \*

The Order in Council of the 15th of March would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war.

A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation, if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy's government or armed forces. It has been conceded the right to establish and maintain a blockade of an enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade. It is even conceded the right to detain and take to its own ports for judicial examination all vessels which it suspects for substantial reasons to be engaged in unneutral or contraband service and to condemn them if the suspicion is sustained. But such rights, long clearly defined both in doctrine and practice, have hitherto been held to be the only permissible exceptions to the principle of universal equality of sovereignty on the high seas as between belligerents and nations not engaged in war.

It is confidently assumed that His Majesty's Government will not deny that it is a rule sanctioned by general practice that, even though a blockade should exist and the doctrine of contraband as to unblockaded territory be rigidly enforced, innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or breach of blockade, much less to detention, requisition, or confiscation.

Moreover the rules of the Declaration of Paris of 1856—among them that free ships make free goods—will hardly at this day be disputed by the signatories of that solemn agreement. (9 *Amer. Jour. Int. Law, Spec. Sup.*, July, 1915, p. 117.)

Protests from neutral sources in regard to the operation of the exceptional measures provided for in the British retaliatory order led to an investigation and special report by a committee. This report was presented to Parliament in February, 1917. The committee as a result of its investigation says in part:

Neutral vessels are brought into British ports under the order in council of March 11, 1915, in order that the belligerent may be satisfied as to the character, ownership, destination, or origin of the cargo which they carry. Whether any delay caused by the methods employed in dealing with ships and cargoes so brought in is or is not avoidable must be determined by reference to the delay which is inseparable from the effective exercise of this right.

That its exercise must involve some delay is plain. This would be true even if the belligerent were to rely exclusively on the



older practice of search at sea. But we are satisfied upon the evidence that the maintenance of this practice is neither possible, in view of the increased size of ships, nor, in view of the conduct of enemy submarines, desirable in the interests of neutral lives and property.

Not only so, but to exercise the right solely by means of the older practice would be tantamount to a complete abandonment of the right itself. The documents carried on a ship no longer furnish conclusive, or necessarily even presumptive, evidence of the true character, ownership, or destination of the cargo. The great increase of facilities by which goods can be circuitously conveyed to or from an enemy country, and the existence of other and speedier means of communication between traders than the ship carrying the goods, afford almost infinite opportunity for concealment. The documents which would disclose the true nature of the transaction, the contracts, correspondence, and cables may pass independently. Unless, therefore, the neutral is provided with better credentials than the documents carried by the ship, the evidence of the real facts has to be sought for by the belligerent from sources outside the ship.

Some alteration, then, not of principle but of practice, became necessary, and the machinery for carrying into effect the order in council of March 11, 1915, is the modern equivalent of the older methods. In order to determine whether the delays resulting from the modern methods can be diminished or avoided, we have considered it our duty to investigate, point by point, the whole of this machinery and have examined witnesses from all the departments concerned.

## 2. METHODS EMPLOYED IN DEALING WITH SHIPS AND CARGOES UNDER THE ORDER IN COUNCIL, MARCH 11, 1915

(1) *Visit at sea*.—All ships intercepted by the patrolling squadrons are visited, the time occupied in so doing being about three hours, except in heavy weather, when delay occurs till the weather moderates sufficiently to permit of boarding. On a decision being taken to send the ship in, she is dispatched under an armed guard to the most convenient port, called a port of detention; in the case of ships going "north-about," for the most part to Kirkwall or Lerwick, but sometimes, if westward bound, to Stornoway, or very occasionally to Ardrrossan. Ships going "south-about" are detained in the Downs or sent into Falmouth or Dartmouth.

(2) *Visit and search at the port of detention*.—On arrival at a port of detention the ship is visited by the customs officers, who examine the manifest, bills of lading, and any other relevant documents which she may be carrying, and prepare a detailed

analysis of her whole cargo. Ships detained in the Downs are visited and reported upon in the same way by the naval authorities. (British Parliamentary Papers, Misc., No. 6 (1917), p. 2.)

The committee seemed to find that the objections of neutrals proceeded from the nature of the order in council of March 11, 1915, rather "than to the machinery by which those provisions were enforced."

*Instructions of the United States, 1917.*—The Instructions for the Navy of the United States Governing Maritime Warfare, issued in 1917, were in accord with the generally understood requirements in regard to visit and search. Some of these requirements were based upon treaty stipulations:

44. Subject to any special treaty provisions, the following procedure is directed: Before summoning a vessel to lie to a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (*coup de semonce*), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

45. If the summoned vessel resists or takes to flight, she may be pursued and brought to by forcible measures, if necessary.

46. When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.

47. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture, she shall be seized and sent in for adjudication (p. 21).

*Changes in practice, 1914-1918.*—Among the many changes in practice during the World War was that of the introduction of extrinsic evidence in regard to lia-



bility of vessels to capture. In early cases it was understood that in a prize court the "property of the neutral claimant shall not be condemned except on evidence coming out of his own mouth or arising out of the clear circumstances of the transaction. If this rule is unsatisfactory to captors, it is nevertheless the rule which the law prescribes." (Sir William Scott, in *The Haabet* (1805), 6 C. Robinson, Admiralty Reports, p. 54.)

The British Prize Court Rules under which these prize courts later acted during the World War permitted the introduction of evidence from most diverse sources, some of it being inferential, from pre-war and postwar trade statistics. A note of the Department of State of the United States to the British Government, October 21, 1915, stated:

The result is, as pointed out above, that innocent vessels or cargoes are now seized and detained on mere suspicion, while efforts are made to obtain evidence from extraneous sources to justify the detention and the commencement of prize proceedings. The effect of this new procedure is to subject traders to risk of loss, delay, and expense so great and so burdensome as practically to destroy much of the export trade of the United States to neutral countries of Europe.

(10) In order to place the responsibility for the delays of vessels and cargoes upon American claimants, the Order in Council of October 29, 1914, as pointed out in the British note of February 10, seeks to place the burden of proof as to the noncontraband character of the goods upon the claimant in cases where the goods are consigned "to order" or the consignee is not named or the consignee is within enemy territory. Without admitting that the onus probandi can rightfully be made to rest upon the claimant in these cases, it is sufficient for the purposes of this note to point out that the three classes of cases indicated in the Order in Council of October 29 apply to only a few of the many seizures or detentions which have actually been made by British authorities.

(11) The British contention that in the American Civil War the captor was allowed to establish enemy destination by "all the evidence at his disposal," citing the *Bermuda* case (3 Wallace, 515), is not borne out by the facts of that case. The case of the *Bermuda* was one of "further proof," a proceeding not to determine whether the vessel should be detained and placed in a

prize court, but whether the vessel, having been placed in prize court, should be restored or condemned. The same ruling was made in the case of the *Sir William Peel* (5 Wallace, 517). These cases, therefore, can not be properly cited as supporting the course of a British captor in taking a vessel into port, there to obtain extrinsic evidence to justify him in detaining the vessel for prize proceedings. (10 Amer. Jour. Int. Law, 1916 Sup. p. 77.)

This naturally led to an attempt to shift the burden of proof of innocence to the ship seized rather than to place upon the captor the burden of proof of guilt of the vessel captured. This and other changes, some of which might be reasonable, were made possible in 1914-1918 because of the weakness of some neutrals and the complaisance of others.

*Defense and offense.*—From the general nature of instructions given or supposed to have been given, it would seem that armed merchant vessels of belligerents were at liberty to fire upon enemy submarines without waiting for any firing by the submarine. The right of resistance has long been admitted and many argue that the most effective resistance is “a defensive attack.” The difference between “a defensive attack” and “an offensive attack” seems to be in the intention of the officer ordering the attack. Intention is not easy to prove, even in time of peace, and in time of war may be even more difficult. Article 22 of the London naval treaty requires submarines to conform to the rules of international law to which surface vessels of war are subject in their action with regard to merchant ships as to sinking or rendering the merchant vessel incapable of navigation. The merchant vessel may be subject to the use of force in case of persistent refusal to stop after summons or of active resistance to visit and search. The pointing of a gun on a vessel flying a belligerent flag at a vessel of war of an enemy would under the ordinary regulations not merely constitute active resistance but constructive attack which it would be the duty of the commander of the submarine to anticipate by his own fire.



## SOLUTION

(a) Under the conditions the action of submarine *No. 5* in summoning the *Star* to lie to is legal and submarine *No. 5* may, in case of persistent refusal, use force as would a surface vessel. The action of submarine *No. 6* in sinking the *Star* is illegal because not in accord with article 22 of the London naval treaty.

(b) The submarine of state X would be justified in firing upon an enemy merchant vessel whose decks have been strengthened for mounting 6-inch guns when the guns are mounted and pointed at the submarine.

(c) A submarine may order a merchant vessel to accompany it to port under penalty of being sunk.